RECORD AND BRIEFS.

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No. 16-1094

IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents are mistaken both in disputing the suitability of this case as a vehicle to decide the question presented and in contesting the existence of a genuine circuit split.

First, Respondents incorrectly suggest that the D.C. District Court — which issued the underlying default judgment — may yet invalidate the service of process in this matter. Under fundamental principles of issue preclusion, the Second Circuit's decision precludes the D.C. District Court from following the conflicting precedent of the D.C. Circuit. The D.C. District Court's predicament — being obligated to apply law at odds with its own Circuit law — dramatically underscores the urgent need for this Court's review.

Second, Respondents can deny the existence of a circuit split only by embracing a facile and unsustainable distinction between service "on" an embassy and service on the foreign state "via," "through," or "in care of" an embassy. In fact, Respondents acknowledge that, but for this semantic ploy, the Second Circuit ruling would be directly at odds with the D.C., Fifth, and Seventh Circuits.

Sudan has demonstrated that the Second Circuit's decision is inconsistent with the plain language of § 1608(a)(3), various decisions by other circuits, relevant legislative history, and binding U.S. treaty obligations under the Vienna Convention on Diplomatic Relations. While Respondents colorfully characterize Sudan's showing as "utterly contrived" (Opp'n 1) and a "sham" (Opp'n 5), Sudan's position is

shared by the United States in a series of briefs including one (App. 148a) postdating the Second Circuit decisions under review, and by at least four foreign sovereigns, each of which have expressed their support for certiorari in this case.

All told, Sudan's Petition is a sound vehicle for addressing a bona fide circuit split on a question of statutory construction that impacts issues of national and international importance.

I. Sudan's Pending Motion To Vacate Only Underscores The Urgent Need For This Court's Review

Respondents err in suggesting that Sudan's motion, in the D.C. District Court, to vacate the underlying default judgment renders the Petition "a needless waste of the Court's time and resources." Opp'n 2. Because the Second Circuit has already ruled on the validity of service of process underlying this case, the D.C. District Court is (regrettably) precluded from finding to the contrary in an action involving the same parties and addressing the same service of process. *See* Restatement (Second) of Judgments § 27 (Am. Law Inst. 1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 731 (2d Cir. 1998) (reversing default judgment because D.C. Circuit decision in parallel enforcement proceedings found initial service of process invalid and decision had preclusive effect

in defendant's attack on the judgment). Such issue preclusion is effective even though the Second Circuit ruling is incorrect and contrary to D.C. Circuit law. *See B&B Hardware, Inc. v. Hargis Indus.*, 135 S. Ct. 1293, 1308 ("[I]ssue preclusion prevents relitigation of wrong decisions just as much as right ones."). Only if this Court grants certiorari and reverses (or vacates) may the D.C. District Court vacate the default judgment for improper service of process.

In a contrived argument against certiorari, Respondents state that the D.C. District Court, rather than this Court, should consider Sudan's arguments. Opp'n 2. But Respondents themselves took the opposite position below: Prior to the Second Circuit issuing any decision, Sudan — seeking to avoid issue preclusion — moved the Second Circuit to hold its decision in abeyance — over Respondents' objection. *See* Motion to Hold the Court's Decision in Abeyance, *Harrison v. Republic of Sudan*, No. 14-121 (2d Cir. July 2, 2015), ECF No. 76. The Second Circuit denied Sudan's motion and issued its ruling. *See* App. 5a n.2. Thus, not only is the D.C. District Court now precluded from reviewing Sudan's service arguments, but Respondents had a hand in denying the D.C. District Court that review. Respondents now cynically urge this Court to defer to the D.C. District Court, which is powerless to entertain Sudan's service arguments.

The D.C. District Court — presumably awaiting resolution of this Petition — is currently required to apply an erroneous Second Circuit decision that directly conflicts with the law of the D.C. Circuit. *See*

Barot v. Embassy of the Republic of Zambia, 785 F.3d 26, 30 (D.C. Cir. 2015) (after improper attempt at service on Zambian Embassy, directing § 1608(a)(3) service on Zambia be addressed and dispatched "'to the head of the ministry of foreign affairs' *in Lusaka, Zambia*" (emphasis added)). Had the D.C. District Court decided Sudan's vacatur motion *before* the Second Circuit ruled, the D.C. District Court undoubtedly would have held Respondents' service "on," "via," or "in care of" Sudan's Embassy invalid under *Barot*. This untenable split of authority — providing conflicting outcomes under the law of different circuits — is precisely why this Court should grant certiorari here.

Contrary to Respondents' suggestion (Opp'n 3), no "evidentiary issues" are relevant to this Court's review of the discrete and purely legal question presented in the Petition, namely whether service on Sudan under § 1608(a)(3) "via" the Embassy was valid. The only facts relevant to this Court's review are undisputed: Respondents attempted service on Sudan by mailing the service package to the Sudanese Embassy in Washington, D.C., not to the Ministry of Foreign Affairs in Khartoum.

II. The Circuit Conflict Is Bona Fide And Impacts Issues Of National And International Importance

To avoid conceding the existence of a conflict with the D.C., Fifth, and Seventh Circuits, Respondents (like the Second Circuit Panel) rely upon a semantic sleight of hand — an artificial distinction between service "on" an embassy and service "via," "through," or "in care of" an embassy. Opp'n 5-14. In fact, Respondents admit that this artificial distinction is

all that separates the Panel Opinion from the D.C., Fifth, and Seventh Circuits (*see* Opp'n 10 (admitting the cases "stand for . . . the basic principle that service on a foreign state . . . cannot be accomplished, under 28 U.S.C. § 1608(a)(3), by directly serving the foreign state's embassy")), and Respondents flatly concede that the Vienna Convention "prohibits service on an embassy" (Opp'n 17 (heading)).

For a number of reasons, the distinction between service "on" and "via" an embassy is meaningless.

1. The natural reading of § 1608(a)(3) does not support a distinction between service "on" and "via" an embassy. The statute requires that process be "addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs." 28 U.S.C. § 1608(a)(3). As the United States has repeatedly emphasized in this case and elsewhere:

> The most natural understanding of [§ 1608(a)(3)] is that the mail will be sent to the head of the ministry of foreign affairs at his or her regular place of work — *i.e.*, at the ministry of foreign affairs in the state's seat of government — not to some other location for forwarding.

App. 141a; *see also* App. 160a-161a.

In their Opposition, Respondents do not address even once the position of the United States. And, though Respondents charge that Sudan's position would require the Court to "rewrite" § 1608(a)(3) to provide that process be dispatched "directly" to the

head of the ministry (Opp'n 18), in fact Respondents' position would insert into the statute the unwritten option of dispatching process "indirectly" to an intermediary, on the assumption those papers will be forwarded to the head of the ministry.

Respondents contrast §§ 1608(a)(3) and (a)(4), suggesting that Congress could have specified in (a)(3) the geographic destination for transmitting service, as it did in (a)(4) directing service "to the Secretary of State in Washington, D.C." Opp'n 18. But, as Sudan already explained (Pet. 20), the clarification was necessary in § 1608(a)(4), but not in § 1608(a)(3), because the United States has secretaries of state in each of the 50 states and the District of Columbia, while each foreign sovereign generally has only one head of the ministry of foreign affairs, usually located in the foreign state's capital city.

Moreover, as the United States has pointed out in rejecting Respondents' argument (App. 142a), a separate contrast in the statute undermines that argument. Specifically, though Congress authorized service via an agent for service on a foreign agency or instrumentality (§ 1608(b)(2)), Congress omitted any reference to an officer or agent for service on the state itself under § 1608(a).

In any event, to the extent the statute is ambiguous, the legislative history makes clear that Congress intended the FSIA service provisions to respect U.S. obligations under the Vienna Convention. Pet. 23-24. Further, if a possible statutory construction exists that avoids creating a violation of U.S. treaty obligations, as is the case

here, then it must be adopted. Restatement (Third) of the Foreign Relations Law of the United States § 114 (Am. Law Inst. 1986) ("Where fairly possible, a United States statute is to be construed so as not to conflict with . . . an international agreement of the United States."); *Roeder v. Islamic Republic of Iran*, 646 F.3d 56, 61 (D.C. Cir. 2011) ("An ambiguous statute cannot supercede an international agreement if an alternative reading is fairly possible.").

2. Service "on," "via," "through," and "in care of" an embassy are all equally violations of the Vienna Convention's protection of mission inviolability, because they each require nonconsensual entry into the mission premises and the embassy to act as an agent for receiving service. *See* Vienna Convention, art. 22(1).

This view of the Convention is hardly a "strawman" or "sham" argument (Opp'n 5), but rather is supported by the United States (App. 143a-144a, 162a-166a), and by other treaty parties that have expressed strong interests in obtaining this Court's review (*see generally* Briefs of *Amici Curiae* United Arab Emirates, Kingdom of Saudi Arabia, Government of National Accord of State of Libya (Apr. 10, 2017); Supp. Br. App. (Austrian Embassy Note Verbale)).

Before the Second Circuit, the United States asserted:

> The intrusion on a foreign embassy is present whether it is the ultimate recipient or merely the conduit of a summons and complaint.

App. 144a.

Here, the United Arab Emirates similarly asserts:

> [T]he panel's analysis assumes it is permissible and appropriate for Congress to commandeer an embassy's internal and protected processes for communicating with its home country . . . [It] offends all of the[] protections [afforded by Articles 22, 27, 29, 31, and 34 of the VCDR, and] . . . mandates the ambassador to play the role of receiving agent for the foreign minister.

United Arab Emirates Br. 7. The Republic of Austria emphasizes:

> Article 22 of the [VCDR] establishes that neither judicial nor administrative acts of public authority by the receiving state are to be exercised on the premises of the diplomatic mission. This includes service of foreign legal documents, both directed at the diplomatic mission itself or at the respective foreign state.

Austrian Embassy Note Verbale ¶ 6. The Kingdom of Saudi Arabia states:

> The notion that an American court can dictate the contents of a diplomatic

> pouch for *mere convenience* of a litigant is repugnant to basic norms of international law.

Saudi Arabia Br. 10 (emphasis in original).

Moreover, as Libya states, the Second Circuit's decision expects too much of the personnel receiving embassy packages, namely to understand the package's contents and whether to accept or reject them:

> [D]eveloping and transitional nations cannot afford the substantial risks of leaving service of process — and, by extension, the specter of default judgment — in the hands of often-transitory embassy staff who lack any delegated authority over legal matters from their home government. And, pursuant to the diplomatic inviolability guaranteed by treaty under Article 22 of the VCDR, they should not have to.

Libya Br. 4. (Here, Respondents baselessly assert that diplomatic "officials" signed for the service package. Opp'n 5-6.) The United States agrees that embassy staff signing for packages are not consenting within the meaning of Article 22. App. 169a n.2.

These views of the Executive Branch and the treaty parties are entitled, respectively, to "great" and "considerable weight." *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1512 (2017). They also are supported by legal scholarship (Pet. 22) and

customary international law (Brief of *Amici Curiae* International Law Professors 12-13 (Apr. 10, 2017)).

Respondents, again, do not expressly address the views of the United States, presumably in the hopes that those views will be overlooked. And, despite requesting additional time to file their Opposition on account of the four amicus briefs filed in support of the Petition, Respondents do not address or rebut a single one.

3. Respondents' meaningless distinction between service "on" and "via" the embassy lacks practical legitimacy as well. The two district court decisions allowing service "via" a defendant's embassy (*Rux* and *Wye Oak*) treat such service, for all practical purposes, no differently than if the service had been service "on" the embassy.

Similarly, here, neither Plaintiffs in the D.C. District Court nor the clerk of the court recognized any such a distinction. The service package was not accompanied by any unique instruction to the Sudanese Embassy to employ its diplomatic pouch to forward the service papers to the head of its Ministry of Foreign Affairs. Plaintiffs also submitted the same proof of service pursuant to 28 U.S.C. § 1608(c)(2) as they would have for service *on* the embassy (a mailing receipt of purported delivery *to the Embassy*), and the 60-day period for Sudan to respond to the complaint (*see id.* § 1608(d)) apparently began running on the date of purported service *on the Embassy* — not some later date of delivery to account for the weeks or months it might take to transmit service by diplomatic pouch to the head of the Ministry of Foreign Affairs in Khartoum.

Respondents' single attempt to identify a practical difference between service "on" and "via" (Opp'n 6) rings hollow. Respondents cite no authority for the outlandish proposition that service "on" an embassy is perfected the moment it is delivered to the embassy without regard to whether it is "accepted." The Vienna Convention unquestionably bars such service altogether. Art. 22(1) (expressly requiring "consent of the head of the mission"); *see also* U.S. Br., *Kumar*, 19 n.2 (App. 169a) ("When staff at United States embassies around the world sign for or accept delivery of packages, the United States does not consider that to amount to consent within the meaning of Article 22."). And merely because examples exist in the case law showing that staff at the Sudanese Embassy rejected service in some instances does not, as Respondents contend (Opp'n 7), translate to a rule that service mailed "via" (or to) an embassy is perfected unless it is rejected.

4. Respondents acknowledge that numerous courts have prohibited service on or through an embassy, mission, or ambassador. *See* Opp'n 10 (citing, *inter alia*, *Barot* and *Magness*). These decisions directly conflict with the Second Circuit but for the artificial distinction between service "on" and "via" the embassy. Yet, even accepting the wordplay as meaningful (which it is not), the Panel Opinion still conflicts with the D.C. and Fifth Circuits.

In *Barot*, the D.C. Circuit makes clear — twice — that proper service entails mailing the service papers to the minister *at the ministry in the foreign country*. 785 F.3d at 28, 30. The court also states that its rationale for requiring service be sent to the ministry,

rather than the embassy, is that "the Ministry is the agency most likely to understand U.S. judicial procedure." *Id.* at 28. The court even credited a prior service attempt for at least being sent to the P.O. Box address of the ministry in Lusaka, Zambia, though the mailing suffered from other defects. *Id.* Respondents are incorrect in suggesting that the *Barot* court would condone mailing service to an embassy so long as the package was addressed to the head of the Ministry of Foreign Affairs (Opp'n 10-11), given the *Barot* court's repeated insistence that service be sent to Lusaka, Zambia in strict compliance with § 1608(a)(3).

Respondents also overlook the factual similarities (and disparate results) of the Fifth Circuit's decision in *Magness*. *See* Opp'n 12. In *Magness*, the Fifth Circuit explicitly rejected the possibility of service transmitted to the proper authorities "care of" other Russian agencies. 247 F.3d 609, 611 (5th Cir. 2001). Respondents offer no explanation why service "via" or "care of" an embassy would be proper under § 1608(a)(3), but "via" a different foreign agency would not.

III. The Second Circuit Decision Is Erroneous

As the Petition shows, the Panel Opinion is inconsistent with both the plain meaning of § 1608(a)(3) and its legislative history. The decision places the United States in violation of its international obligations and compromises U.S. interests abroad — another issue Respondents completely ignore. The United States and already four of its treaty partners support Sudan's position.

By contrast, the only support Respondents cite for upholding the Panel Opinion are two prior district court cases from the same court, *Rux* and *Wye Oak*, where one case relies on the other. Opp'n 15-16. These erroneous decisions also fail to meaningfully distinguish service "on" and "via" an embassy.

Contrary to Respondents' argument (Opp'n 19), congressional acquiescence cannot be gleaned from the absence of amendments to § 1608(a)(3) in the years after *Rux* when Congress amended the "terrorism exception" to sovereign immunity (28 U.S.C. § 1605A). Service under § 1608(a)(3) is broadly applicable to all FSIA cases and has no particular bearing on terrorism exception cases. Moreover, the issue of service "via" an embassy had not, at that time, received the attention from the United States and the diplomatic and international communities that it now has. This Court need not wait for Congress to act; the statute is clear and this Court should grant certiorari to bring the Second Circuit in line with its sister circuits.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant certiorari.

Respectfully submitted,

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